IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7250 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ABHESINH @ ABHO JASHWANTSINH RAJ

Versus

COMMISSIONER OF POLICE

Appearance:

MR SUNIL C PATEL for Petitioner

MR KT DAVE, AGP, for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 11/04/2000

ORAL JUDGEMENT

1. On August 31, 1999, Commissioner of Police, Baroda City, Baroda, passed an order in exercise of powers under Section 3(1) of the Gujarat Prevention of Anti-Social Activities Act, 1985 ("PASA Act") for short, detaining Abhgesinh @ Abhi Jashwantsinh Raj of Navinagari, Underagam, Vadodara, under the provisions of

the said Act.

2. The detaining authority branded the detenu as a bootlegger. For this purpose, the detaining authority took into consideration following offences :-

S.No.	Police Station and Crime Register No.	Prohibition Sections.
01	Jawaharnagar/ III 129/97	66(B) and 65-E
02	Prohibition Station/ 61/97	66(B) and 65-E
03	Prohibition Station/ 516/98	66(B) and 65-E
04	Jawaharnagar/ III 49/99	66(B) and 65-E

Besides the above offences, the detaining authority also considered statements of three anonymous witnesses and, after considering less drastic remedy, came to conclusion that the petitioner is required to be immediately prevented from pursuing his activities and, therefore, he is required to be detained under the PASA Act, as resorting to other less drastic remedies may not prove to be efficacious.

3. The detenu has challenged the order of detention on various grounds. However, Mr. S.C. Patel, learned advocate appearing for the petitioner, has restricted his arguments to the grounds of non-supply of relevant documents in respect of the registered offences, non-consideration of relevant documents by the detaining authority while passing the order and improper exercise of powers under Section 9(2) of the PASA Act of claiming privilege of not disclosing the identity of witnesses in respect of three anonymous witnesses. Mr. Patel, therefore, submitted that the order of detention is bad in law and may be quashed and set aside by allowing this petition.

4. Mr. K.T. Dave, learned Assistant Government Pleader, has opposed this petition. He submitted that the order is based on various grounds. The detaining authority has verified the statements and has exercised the powers under Section 9(2) of the PASA Act. He

submitted that the offences registered against the detenu have also been considered. The documents relied upon by the detaining authority while passing the order were supplied to the detenu along with the grounds of detention. Certain other documents have also been supplied to the detenu even without a demand. As such, there is no infringement of right of the detenu of making a representation in respect of these offences.

5. Now, coming to the rival side contentions, it may be noted that the detaining authority has relied on four offences registered against the detenu. It is stated at the Bar by Mr. Dave, learned Assistant Government Pleader, after consulting the file, that, so far as Prohibition Station C.R. No.516 of 1998 is concerned, the detaining authority did not have any statement before it in respect of these offences while it passed the order and no statement in this regard is supplied to the detenu as well. According to Mr. Dave, as the statements are not relied upon, they are not required to be given to the detenu. However, the correct position of law would be that, when a detaining authority places reliance on an offence registered against the detenu, it is expected to consider the statements of witnesses in respect of that offence and, if that is not done, it would vitiate the subjective satisfaction. In this regard, decision in the case of Jeeva Veiyapuri Madrasi v. Commissioner of Police, Ahmedabad & Another, 1991(1) GLH 346 can be profitably looked into. In that decision, it was held that where in an order passed under Section 3 of the PASA Act, charge sheet in respect of a criminal case is placed before the detaining authority and not the statements under Section 161 of Code of Criminal Procedure, the subjective satisfaction would stand vitiated and, therefore, the whole order of detention would be vitiated. Thus the impugned order is bad in law.

6. So far as other offences are concerned, namely, Jawaharnagar III-127/97, Prohibition Station No.61/97 and Jawaharnagar III-49/99, it is stated at the Bar by learned Assistant Government Pleader, Mr. Dave, after consulting the file, that statements of witnesses Surendra, Karansinh and Sumanbhai, respectively were placed before the detaining authority at the time of passing of the detention order. However, they were not supplied to the detenu along with the grounds of detention. Statement of one Parakramsinh in respect of Prohibition Station C.R. No.61 of 1997 has not been supplied till date, whereas the statements of other witnesses were subsequently supplied to the detenu by the detaining authority voluntarily by communication made on

some date in February 2000. Thus, the right of the detenu of making an effective representation can be said to have been affected or infringed. The continued detention, therefore, would be rendered bad in law.

7. Now, coming to the statements of anonymous witnesses, it may be noted that the statements came to be recorded on August 17 and 18, 1999. They were verified on August 27, 1999 by the detaining authority and the order was passed on August 31, 1999. The statements are assailed on behalf of the petitioner on two grounds. The first being that the contents of the statements would indicate that they reveal the identity of the maker of the statements, as they give full details of the incident in respect of time, place and the manner in which the incident occurred. The detaining authority has not considered this aspect and has exercised the privilege of not disclosing the identity. The second ground on which the statements of anonymous witnesses are assailed is that the detaining authority has not undertaken proper exercise before exercising these powers. In this regard, reliance is placed on the decision in the case of Bai Amina v. State of Gujarat & Others, 1981 GLR 1186, which has been again confirmed by a Full Bench of this Court in the case of Chandrakant Patel v. State of Gujarat, 1994 (1) GLR 761 and again followed by a Division Bench of this Court in Kajalben G. Sindhi v. Commissioner of Police, Ahmedabad & Ors. 2000 (1) GLH 320.

8. While going through the statements, in the opinion of this Court, there is substance in what is argued on behalf of the petitioner that the contents of statements of witnesses reveal full details as regards time, place of manner of occurrence. The incident has taken place in a small village of Undera and, therefore, the statements leave hardly anything to imagination for knowing the identity of the maker of the statements. This aspect is not considered by the detaining authority while exercising powers of not disclosing the identity of the witnesses. The detaining authority, if it has considered this aspect, would have had realised that the exercise of powers under Section 9(2) of PASA Act would be in futility. Thus, there is non-application of mind in this regard on part of the detaining authority while claiming privilege.

9. It is also worth noting that the statements have been verified by the detaining authority. If the verification is seen, it is only a reiteration of the earlier statements by the witnesses in respect of the fear qua the petitioner and in respect of maintenance of

anonymity. A look at the affidavit in reply, particularly paragraph 5, 6 and 7.1, would indicate that the detaining authority has asserted about the personal verification of the genuineness, correctness and veracity of the incidents narrated by the witnesses, has also asserted that he has followed the procedure regarding claiming of privilege and has personally tested the veracity or otherwise of the statements of the witnesses before exercising powers under Section 9(2) of the PASA Act. However, neither the affidavit nor the grounds of detention indicate anything to show that the detaining authority undertook the exercise of probing into the general background, character, antecedents, criminal tendency or propensity, etc. of the detenu and such of those matters which can be said to be relevant in context of the informant before exercising these powers. There appears not any contemporeneous material to indicate undertaking of such exercise. In absence of any such material, it is difficult to accept the assertion on part of the detaining authority about having followed the procedure and having personally verified the correctness and genuineness of the fear expressed by the witnesses. There does not appear anything to indicate any attempt on part of the detaining authority to procure information by assuring the witnesses full protection in place and stead of the promise of confidentiality.

10. In view of the above discussion, it is evident that the subjective satisfaction recorded by the detaining authority regarding the fear expressed by the witnesses qua the detenu being genuine cannot be accepted. Likewise, exercise of powers under Section 9(2) of the PASA Act in "public interest", as stated in the grounds of detention, is not backed by any material except the bald assertion that it is in public interest. There appears nothing to indicate an exercise having been undertaken by the detaining authority of delicately weighing the public interest vis-a-vis the interest of the detenu [which is also held to be public interest in Bai Amina's case (supra)] and held to be a good law in case of Chandrakant Patel (supra) by a Full Bench of this Court.

11. Lastly, in case of Kajalben G. Sindhi v. Commissioner of Police (supra), a Division Bench of this Court observed thus:

> "In the instant case, not only there is nothing in the contemporeneous record with regard to formation of such opinion or satisfaction regarding withholding of names and material

particulars by the detaining authority, but nothing is stated in the grounds of detention."

Thus, besides other grounds, want of contemporeneous record for forming the opinion for the need for exercise of powers under Section 9(2) in public interest has been held to be necessary for supporting such exercise by the detaining authority, which is lacking in the instant case.

12. This Court is, therefore, of the view that the impugned order cannot be supported as it suffers from various defects as discussed above and the petition deserves to be allowed.

13. In the result, the petition is allowed. The impugned order of detention dated August 31, 1999, passed against the detenu is hereby quashed. The detenu-Abhesinh @ Abho Jashwantsinh Raj is ordered to be set at liberty forthwith, if not required in any other matter. Rule is made absolute with no orders as to costs.

[A.L. DAVE, J.]

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